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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARTURO MARTINEZ, Plaintiff/Appellant, v. SCHUTT SPORTS, an Illinois corporation, Defendant/Appellee.	)	2 CA-CV 2006-0133 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20012486

Honorable John E. Davis, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Appellant Arturo Martinez appeals from an adverse jury verdict on his product liability claim against Schutt Manufacturing Company, arguing the trial court erred by

instructing the jury on the defense of assumption of the risk and the verdict is contrary to law and not supported by the evidence. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 In July 2000, Martinez participated in a softball tournament at Tucson SportsPark. During the second game of the tournament, he attempted to slide into second base and his right leg was severely fractured. In May 2001, he filed a lawsuit, and in August 2002, he amended his complaint and added Schutt Manufacturing Company (SMC), alleging it had "manufactured a base that was inherently flawed in that the design was defective and/or did not provide the safety for which it was marketed and/or did not provide adequate warning of the risk or hazard to the way the product was designed."[1] Evidence presented during trial established that the base in question, the Saf-T-Slider, is a stationary base that does not dislodge when struck by sliding players and was designed with a low profile and sloping sides so players will safely slide up and over it. Martinez claimed he was injured when his foot caught on the base while he was sliding, that the base had therefore not functioned as it was designed to, and its design is unreasonably dangerous. SMC requested a jury instruction on assumption of the risk, which the trial court gave over Martinez's

[1]Martinez's complaint also named as defendants SportsParks of America, Inc., and Pima County. In December 2004, the trial court granted summary judgment in favor of both these parties, although Martinez's opening brief suggests they ultimately settled the case prior to the trial. They are not involved in this appeal.

objection. After the jury returned a verdict in SMC's favor, the court denied Martinez's motion for a new trial and this appeal followed.

Jury Instructions

¶3 Martinez first contends the court erred by instructing the jury on SMC's assumption of the risk defense. When reviewing whether a requested jury instruction should have been given, we look at the evidence in the light most favorable to the requesting party. *Anderson v. Nissei ASB Mach. Co.*, 197 Ariz. 168, ¶ 39, 3 P.3d 1088, 1098 (App. 1999). "[I]f there is any evidence tending to establish the theory posed in the instruction, it should be given even if there are contradictory facts presented." *Andrews v. Fry's Food Stores of Ariz.*, 160 Ariz. 93, 95, 770 P.2d 397, 399 (App. 1989); *see Anderson*, 197 Ariz. 168, ¶ 39, 3 P.3d at 1098.

¶4 Assumption of the risk is a doctrine that applies the maxim *volenti non fit injuria* or one who consents can receive no injury. *Moore v. Gray*, 3 Ariz. App. 309, 312, 414 P.2d 158, 161 (1966). It is limited to those cases in which a plaintiff has voluntarily chosen to accept a known risk. *See Frontier Motors, Inc. v. Horrall*, 17 Ariz. App. 198, 201, 496 P.2d 624, 627 (1972). For the doctrine to apply, a plaintiff must have more than a general knowledge of a danger; "rather, the plaintiff must have actual knowledge of the specific risk which injured him and appreciate its magnitude." *Cota v. Harley Davidson*, 141 Ariz. 7, 14, 684 P.2d 888, 895 (App. 1984). A subjective standard is applied to determine

what the plaintiff actually knew, understood, and appreciated. *Bruce Church, Inc. v. Pontecorvo*, 124 Ariz. 305, 309, 603 P.2d 932, 936 (App. 1979).

¶5 Martinez argues there was no evidence at trial that he knew of the specific risk that injured him because "there was no evidence presented [that he] knew the base would not function as designed."[2] But we believe he has misstated the issue.[3] In the context of a product liability claim, the assumption of the risk doctrine applies when a plaintiff chooses to use a product after he or she has learned of a defect in the product. *See Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 402, 904 P.2d 861, 864 (1995) (plaintiff who discovers defect and uses product has assumed the risk). The plaintiff must also be aware of the specific risk that defect creates. *See Cota*, 141 Ariz. at 14, 684 P.2d at 895 (affirming trial court's refusal to give assumption of risk instruction where plaintiff did not have knowledge of specific risk created by defective product). During trial, Martinez claimed the base was defectively designed because stationary bases, like the Saf-T-Slider, cause more injuries than bases designed to dislodge when struck by sliding players and because his foot had caught

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[2]In his reply brief, Martinez concedes there was evidence he knew of the general risks associated with sliding during a softball game.

[3]Martinez did not testify about how he believed the Saf-T-Slider was designed to function, and there was no evidence he believed it would function differently from other stationary bases. Because there was evidence the specific risk that allegedly injured Martinez is the same risk created by all stationary bases, whether he consented to the risk of sliding into the Saf-T-Slider is properly posed as whether he consented to the risk of sliding into a stationary base. *See* 65 C.J.S. *Negligence* § 373 (2000) (precise cause of harm arising from risk need not be anticipated to justify assumption of risk).

on the base. The issue, therefore, is whether there was any evidence that Martinez knew the base was stationary and that his foot could become caught and his leg injured while sliding into it.

¶6 Martinez testified he did not know the bases being used at SportsPark were stationary; he believed they were "[Break Away Bases] similar to [those used by his son's] little league" team. Break Away Bases differ from stationary bases in that they are designed to dislodge from their anchoring mechanisms when they are struck by sliding players. Martinez's own testimony, however, is not necessarily conclusive as to what he knew, *see Davis v. Waters*, 103 Ariz. 87, 90, 436 P.2d 906, 909 (1968), and there was some "evidence tending to establish" that he knew the bases were stationary. *Andrews*, 160 Ariz. at 95, 770 P.2d at 399. Martinez testified he had previously coached a Little League team for approximately eleven years and his team had used Break Away Bases.[4] The inventor of the Break Away Base testified at trial, and when asked if someone could confuse the Break Away Base for a stationary base, he stated: "I don't see how they could assume. I have distinctive marks on my base. They couldn't mistake that if they looked at it." Furthermore, Martinez had watched softball games at SportsPark on several occasions, and there was evidence, contrary to his testimony, that he had played in tournaments there prior to the

[4]The inventor of the Break Away Base, Roger Hall, testified that in addition to his base, at least two other "release-style bases" had been available on the market. Martinez testified he did not know if his Little League team had used the Break Away Base designed by Hall.

incident, and he said he had never seen the bases there dislodge.[5] Thus, viewing the evidence in the light most favorable to SMC, *see Anderson*, 197 Ariz. 168, ¶ 39, 3 P.3d at 1098, there was some evidence Martinez knew the bases at SportsPark were stationary.

¶7 There was also evidence that Martinez had extensive experience coaching baseball and playing and watching softball and that it is not uncommon during a baseball or softball game for a sliding player's foot to catch on a stationary base, resulting in a leg injury. Martinez testified he knew injuries "[d]efinitely" occurred during softball games. The evidence of his extensive experience with softball and baseball constituted some evidence he knew of the risk that his leg could be injured while sliding into a stationary base. *See* 65 C.J.S. *Negligence* § 373 (2000) (age and experience appropriate factors in determining whether plaintiff had knowledge of risk). Moreover, the jurors could have questioned Martinez's credibility about his knowledge of the risk in view of the contradictory evidence of his experience playing softball. Finally, the jury could have found that inherent in sliding leg-first into a stationary base is the risk that the slider's foot or leg may be injured. *See* Restatement (Second) of Torts § 496D cmt. d (1965) ("There are some risks as to which no

[5]Martinez testified he had never played in a softball game before the night of the incident, but one of his teammates testified Martinez had played in other softball tournaments with the team, and another teammate testified Martinez had "played with [the team] for a long time on and off." There was also testimony by one of Martinez's teammates suggesting he had first met Martinez while Martinez was playing in a softball tournament at SportsPark prior to the incident. When asked if he had ever seen the bases "break away at the Sports[P]ark," Martinez replied he had "never paid attention."

adult will be believed if he says that he did not know or understand them."); 65 C.J.S. *Negligence* § 373 (2000) (same).

¶8 Martinez cites *Cota*, 141 Ariz. at 14, 684 P.2d at 895, to support his claim that there was no evidence he had knowledge of the specific risk that injured him.[6] In *Cota*, the plaintiff was riding a motorcycle when he collided with a pickup truck; one of the gasoline tanks on the motorcycle ruptured, resulting in a fire that seriously burned him. *Id.* at 8, 684 P.2d at 889. Cota sued the motorcycle manufacturer and, during trial, testified he knew it was easier to be injured on a motorcycle than in an automobile and "if a person punched a hole in a gasoline tank the gas would pour out and could be ignited by a flame or spark nearby." *Id.* at 14, 684 P.2d at 895. Based on this testimony, the manufacturer requested a jury instruction on the assumption of the risk defense. In affirming the trial court's refusal to give the instruction, this court found the plaintiff's "testimony show[ed] no more than a general knowledge of danger." *Id*. We held there was no evidence he knew of the specific risk that injured him because he did not know "that the tank could be penetrated by the fairing bracket . . . [or] that the gas tank was capable of being ruptured by a mirror bracket at a speed between 20 and 30 mph." *Id*.

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[6]As Martinez points out in his reply brief, he also cites more than fifty other cases. But, because they provide only tangential support and are primarily from jurisdictions other than Arizona, we need not address each of them individually.

¶9 We do not believe *Cota* assists Martinez. In *Cota*, there was no evidence the plaintiff knew how readily the gas tank could be ruptured at a relatively low speed and cause him severe injury. As discussed above, however, there was evidence Martinez knew that the base was stationary and that his foot could catch on a stationary base and his leg be injured.[7] Thus, we find there was some evidence from which the jurors could conclude Martinez assumed the risk created by sliding into the Saf-T-Slider. *See* Restatement (Second) of Torts § 496D cmt. e (1965) (whether plaintiff knew of existence of risk usually question of fact for fact finder); 65 C.J.S. *Negligence* § 373 (2000) (same); *see also Galindo v. TMT Transport, Inc.*, 152 Ariz. 434, 437, 733 P.2d 631, 634 (App. 1986). Accordingly, the trial court committed no error by giving an instruction on the assumption of the risk defense. *See Anderson*, 197 Ariz. 168, ¶ 39, 3 P.3d at 1098.

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[7]Martinez suggests that if the instruction was properly given in this case, "an assumption of the risk instruction would have to be given in every personal injury case because there is a risk of injury in everything." We disagree. For example, in a negligence claim, it would not be sufficient that a plaintiff knew of the risk that another might act negligently. Rather, the plaintiff must be aware that another has acted or will act negligently and know the risk created by this negligence. *See* Restatement (Second) of Torts § 496A cmt. c(3) (1965) (plaintiff assumes risk when, aware of risk created by negligence of defendant, he or she voluntarily encounters it); *Galindo v. TMT Transport, Inc.*, 152 Ariz. 434, 437, 733 P.2d 631, 634 (App. 1986) (same). Similarly, in a product liability claim, it is not sufficient that a plaintiff know of the risk that a product might be defective. Rather, the plaintiff must know of the alleged defect and of the specific risk that defect creates. *See Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 402, 904 P.2d 861, 864 (1995); *Cota*, 141 Ariz. at 14, 684 P.2d at 895. Here, there was evidence Martinez was aware of the alleged defect, the fact that the base was stationary, and the risk it created.

Verdict

¶10 Martinez next contends the verdict is contrary to law and not supported by the evidence. In reviewing a jury verdict, we view the evidence in the light most favorable to sustaining the verdict. *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 2, 81 P.3d 1016, 1019 (App. 2003). If any substantial evidence could lead reasonable persons to find the ultimate facts sufficient to support the verdict, we will affirm the judgment. *Mullin v. Brown*, 210 Ariz. 545, ¶ 2, 115 P.3d 139, 141 (App. 2005). If "'"there is a dispute in the evidence from which reasonable [persons] could arrive at different conclusions as to the ultimate facts, we will not disturb . . . the verdict[, even if] we do not agree with the conclusion reached."'" *Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 14, 961 P.2d 449, 451 (1998), *quoting Hutcherson v. City of Phoenix*, 188 Ariz. 183, 196, 933 P.2d 1251, 1264 (App. 1996), *quoting Spain v. Griffith*, 42 Ariz. 304, 305, 25 P.2d 551, 551 (1933) (alteration in 192 Ariz. 51). But "'"if there is no evidence in the record which would justify such a conclusion by the triers of fact, it is not only our right, but our duty, to set aside a verdict."'" *Id., quoting Hutcherson*, 188 Ariz. at 196, 933 P.2d at 1264, *quoting Spain*, 42 Ariz. at 305, 25 P.2d at 551.

¶11 The jury was instructed that Martinez was required to prove: (1) SMC was a manufacturer or seller of a product; (2) the product was defective and unreasonably dangerous; (3) the defect caused him injury; and (4) he suffered damages as a result of the

defect. The court then instructed the jury that a product is defective and unreasonably dangerous "if the harmful characteristics or consequences of its design outweigh the benefits" or if the product "fails to perform as safely as an ordinary consumer would expect when the product is used in a reasonably foreseeable manner."

¶12 It was uncontested that SMC manufactured the base and Martinez suffered damages. Martinez contends the verdict was not supported by the evidence because there was "unconstricted [sic] evidence" that he "broke his leg when the base did not function as designed." Presumably, he is asserting there was uncontradicted evidence proving the second and third elements listed in the instruction—that the base "was defective and unreasonably dangerous" because it failed "to perform as safely as an ordinary consumer would expect" and the "defect caused him injury." SMC responds "it was not uncontradicted" that "the base did not function as designed; nor was it uncontradicted that [Martinez] broke his leg when he struck [the] base."

¶13 As noted earlier, the Saf-T-Slider was designed to permit players to slide up and over it. Several witnesses to the incident testified that Martinez had slid "over the bag" and that, when he had finished sliding, "his butt and his back were on top of the base." Doctors Richard Nelson and Patrick Hannon testified about a study on feet-first sliding that found players could be injured by their heel catching on the ground before they reach a base. And a report by Hannon stated: "It is by no means clear that the base was even contacted

by Mr. Martinez in this . . . incident." Martinez testified he did not remember sliding or the manner in which he was injured, and although several witnesses testified Martinez had indeed struck the base, it was for the jurors to determine their credibility.[8] *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12, 9 P.3d 314, 318 (2000). We find there was evidence from which the jurors could have concluded that the base had functioned as it was designed and that it had not caused Martinez's injury.

¶14 Moreover, Hannon concluded that Martinez had begun his slide late and his leg would have fractured even had the base been designed to break away. Another witness to the incident described Martinez's slide as a late slide, and there was evidence that late slides increase the risk of injury. There was also evidence that sliding injuries occur with both stationary and Break Away Bases. Thus, even if the jurors found Martinez fractured his leg when he struck the base, they could have concluded he would have been injured by any base and the Saf-T-Slider, therefore, had not functioned other than "as an ordinary consumer would expect" under the circumstances.

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[8]Five witnesses to the incident testified, and the jury could have questioned the reliability of each. Benjamin Lopez, one of Martinez's teammates, testified the incident had occurred "in wintertime" when "it was cold," although it had occurred in July. Jesse Jones, another of Martinez's teammates, was "quite a ways away" from the play, and Leticia Martinez, Martinez's wife, was "[i]n the bleachers" when the incident occurred. Arturo Martinez, Jr., Martinez's son, was coaching first base and looking at Martinez's "back and his butt as he's sliding." And Jerry Gastellum, the umpire, testified he "kind of" remembered the incident, but his recollection was "vague" because he had seen "a lot of injuries there at the park" and they "all run together."

Disposition

¶15 We conclude substantial evidence supports the jury's verdict and affirm the trial court's decision to instruct the jury on the assumption of the risk defense.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge